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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ATTORNEY GENERAL, *et al.*,

Petitioners,

—v.—

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

RULE 29.6 STATEMENT

This brief is filed on behalf of eight individuals—Aiad Barakat, Naim Sharif, Khader Musa Hamide, Julie Nuangugi Mungai, Ayman Mustafa Obeid, Amjad Obeid, Michel Ibrahim Shehadeh, and Basher Amer—and the American-Arab Anti-Discrimination Committee (ADC). The ADC does not have any parent or subsidiary companies.

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A. Introduction

This case began in 1987 when the Immigration and Naturalization Service (INS) arrested the individual plaintiffs, seven Palestinians and a Kenyan, and charged them with being deportable as members of an organization that advocates the "doctrines of world communism." No one had been deported under that charge for 26 years.[1] When plaintiffs filed suit challenging the constitutionality of these charges, the INS dismissed the original charges and substituted others. It then called a press conference to announce that the changes were tactical only, and that it still sought plaintiffs' deportation because of their political associations. Shortly thereafter, the FBI Director testified in Congress that if plaintiffs had been citizens there would have been no basis for their arrest, and that they had been arrested because of their association with a Communist organization.

Faced with evidence that the government had targeted them in retaliation for their associations, plaintiffs understandably were afraid to continue to engage in further political activity in support of Palestinian causes. Believing nonetheless that their political activity was protected by the First Amendment, plaintiffs sought relief in the only forum available to them—federal district court.

The government agreed at the outset that selective enforcement claims could be heard only in an original district court action.[2] The reason for this is straightforward: While 8 U.S.C.

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[1] *See Matter of S.*, 9 I & N Dec. 252 (BIA 1961).

[2] Order Re: Selective Prosecution Claim and Third Claim for Relief (Sept. 6, 1989) at 1-2 ("both parties agree and we concur that jurisdiction to hear Plaintiffs' selective prosecution claim exists in this Court"); Defendants' Memorandum in Response to the Court's Order of May 4, 1989 Concerning Its Jurisdiction over Plaintiffs' Selective Prosecution Claim and the Effect of Declaratory Relief (filed May 25, 1989) (CR 89) at 3 ("to the extent that it is appropriate for any court to entertain a selective enforcement challenge to the issuance of an Order to Show Cause, jurisdiction is in the district court").

§ 1105a (1994) generally creates exclusive review in the court of appeals for final orders of deportation, claims that cannot be heard on appellate review must be filed in an original district court action. Plaintiffs' selective enforcement claims could not be heard on appellate review because they required factual development beyond the scope of the administrative record,[3] and appellate review must be based "solely upon the administrative record." 8 U.S.C. § 1105a(a)(4). Applying well-established law, the lower courts therefore found district court jurisdiction proper under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 (1988).

Despite its initial concession that jurisdiction was proper in the district court, the government now argues that the district court never had jurisdiction, and that the only court that ever had jurisdiction over plaintiffs' claims was a court of appeals exercising appellate review of a final deportation order under 8 U.S.C. § 1105a.

B. Statement Of Facts

The injunctions under review are based on factual findings reached after considering a record consisting of over 11,000 pages of evidence, much of it developed through court-ordered discovery. In particular, the district court found: (1) that defendants singled plaintiffs out for their constitutionally protected associations with the Popular Front for the Liberation of Palestine (PFLP), without any evidence that plaintiffs specifically intended to further any unlawful ends; (2) that defendants did not seek to deport other similarly situated individuals; and (3) that plaintiffs are suffering irreparable injury to their First Amendment rights as a result of the government's retaliatory actions.

[3] Pet. App. 12a, 87a; Pet. Br. 38. Immigration judges and the Board of Immigration Appeals (BIA) do not have authority to review District Directors' discretionary decisions, including the decision to institute a deportation proceeding. Pet. App. 87a. Plaintiffs attempted to present their selective enforcement claims in the deportation hearings, but the INS successfully argued to the immigration judge that she lacked jurisdiction to hear them. *See* C.A. Supp. Exc. of Record 38 (excerpt of transcript from deportation hearing).

These findings, *unchallenged by defendants on appeal*, could only be developed in district court, and are therefore critical to assessing the jurisdictional issue presented here.

1. Defendants Targeted Plaintiffs For Their Lawful Political Associations And Activities

The district court found that defendants targeted plaintiffs for their political associations, and that "there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14. This finding was supported by a wide range of evidence, including the following:

1. The initial charges were predicated on First Amendment-protected activity—association with a group that advocates the doctrines of world communism. Pet. App. 3a, 80a-82a.

2. Then-FBI Director William Webster testified in Congress two months after plaintiffs' arrests that an FBI investigation had found no evidence of criminal or terrorist activity, that plaintiffs "were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation," and that "if these individuals had been United States citizens, there would not have been a basis for their arrest."[4]

[4] Pet. App. 4a; J.A. 65-67. Had plaintiffs been supporting *illegal* conduct of the PFLP, they would have been subject to arrest (even as United States citizens) under the conspiracy or aiding and abetting statutes, 18 U.S.C. §§ 2, 371, and numerous statutes reaching terrorist acts abroad. *See, e.g.*, 18 U.S.C. § 32 (destruction of aircraft in foreign air commerce); § 33 (destruction of motor vehicle in foreign commerce); § 956 (conspiracy to injure foreign property); § 1116 (attacking internationally protected persons); § 1201 (kidnapping of person in foreign commerce); § 1203 (taking of hostages); § 1361 (damage to American property); § 2332 (killing Americans abroad). Support of illegal activi-

3. The INS District Director who authorized the deportation proceedings admitted that plaintiffs "were singled out for deportation because of their alleged political affiliations with the [PFLP]." J.A. 93. He stated that the INS sought plaintiffs' deportation "at the behest of the FBI, which concluded after investigating plaintiffs that it had no basis for prosecuting plaintiffs criminally, and urged the INS to seek their deportation." J.A. 94.

4. When the INS changed its charges in response to plaintiffs' constitutional challenge, INS Regional Counsel William Odencrantz announced that the change was merely tactical, and that the INS continued to seek deportation of all eight plaintiffs because "[i]t is our belief that they are members of [the PFLP]." J.A. 72-73; Pet. App. 82a.[5]

5. Contemporaneous FBI memoranda prepared to urge the INS to deport plaintiffs confirm that plaintiffs were targeted solely for lawful political associations and advocacy. The documents consist entirely of accounts of lawful political activity, and include detailed reports on political demonstrations, meetings, and dinners, as well as extensive quotations from political speeches and leaflets. Over 300 pages are devoted to tracking plaintiffs' distribution of PFLP newspapers that are available in public libraries throughout the United States. The memos repeatedly criticize plaintiffs' political views as "anti-US, anti-Israel, anti-Jordan," J.A. 150-51, 172-74, 181, 184, 190-91, and even "anti-REAGAN and anti-MABARAK [sic]." J.A. 165. The principal FBI report on plaintiffs states that its purpose is "to identify key PFLP people in Southern California so that law enforcement agencies capable of *disrupting the PFLP's activities* through legal action can do so." J.A. 152 (emphasis added). It specifically urges plaintiff Hamide's deportation, not because he engaged in any criminal acts, but because he is "intelligent, aggressive, dedicated, and shows great leadership ability." J.A. 142-43.

6. While the government and both of its amici misleadingly imply that plaintiffs' fundraising activities were the basis for the decision to deport, Pet. Br. 3, 11, 43-44, the district court found to the contrary that defendants were motivated by a wide range of speech and associational activities other than fundraising. The court found, based on government concessions, that the government targeted plaintiffs for their membership in the PFLP (Pet. App. 4a, 75a n.14, J.A. 93), distributing PFLP literature (Pet. App. 132a), recruiting new members (*id.*), communicating with PFLP leaders in the United States, and attending PFLP meetings, in addition to humanitarian fundraising. (Pet. App. 60a-61a).[6]

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ties would also have warranted deportation under several provisions of the Immigration and Nationality Act (INA), none of which has ever been invoked here. *See, e.g.*, 8 U.S.C. §§ 1227(a)(2)(A) (crimes of moral turpitude); (a)(2)(D) (conspiring to commit sabotage or sedition); (a)(4)(A) (any criminal activity that endangers public safety or national security).

[5] On the eve of the first preliminary injunction hearing in this case, the INS dropped its political association charges against the six nonimmigrant aliens—Aiad Barakat, Naim Sharif, Julie Mungai, Ayman Obeid, Amjad Obeid, and Basher Amer—and instead charged them with violating their visas, either by staying longer than permitted, working without authorization, or taking too few credits while on a student visa. It maintained political association charges against permanent residents Khader Hamide and Michel Shehadeh, first substituting a charge that they were associated with a group that advocates the destruction of property, and subsequently shifting to a charge that they provided material support to a terrorist organization. The INS has since granted Barakat and Sharif legalization, and accordingly concedes they are no longer subject to deportation "based on the original status violations." Pet. Br. 11 n.5. However, while the existing injunction bars the INS from filing new charges against Barakat and Sherif, the INS has not disavowed its intent to seek the deportation of all eight. All plaintiffs would be eligible to reside here permanently but for the government's charges that they are associated with the PFLP.

[6] Although one would never know it from the government's brief, the district court also found, and defendants have conceded, that the PFLP—the second largest faction within the Palestine Liberation Organization—engages in a wide range of lawful activities both here and abroad, including the provision of "education, day care, health care, and social security, as well as cultural activities, publications, and political

2. Defendants Did Not Seek To Deport Similarly Situated Aliens

The district court also found that the INS has not sought to deport similarly situated aliens, including aliens with the same technical visa violations as plaintiffs, and aliens who were members and supporters of organizations that engaged in similar INA-proscribed activities and advocacy, such as the Nicaraguan Contras, Afghanistan Mujahedin, Mozambique RENAMO, several anti-Castro Cuban groups, and the Vietnamese Montagnards. Pet. App. 18a-19a, 106a-07a, 138a-50a, 50a-51a n.3, 74a; C.A. SER 97-265, 286-90, 309-31. In fact, the INS has not sought to deport *any* aliens other than plaintiffs for mere association since this case began more than 11 years ago. J.A. 207.[7]

organizing." Pet. App. 48a. Among other things, it operates day care centers, hospitals, and schools; provides health insurance to its members and their families; publishes political magazines and newspapers; and maintains diplomatic offices in many countries. J.A. 77-84.

[7] In light of the government's failure to challenge any of the district court's findings as clearly erroneous, the Court should not be misled by its Statement, which makes assertions that have no support in or are directly contradicted by lower court findings. For example, the government begins its brief with a litany of charges regarding the PFLP's past terrorist acts. Pet. Br. 2-3 n.1. But the district court found (and the government does not dispute) that plaintiffs were not "in any way implicated" in any unlawful PFLP activities. Pet. App. 48a.

Similarly, the government asserts that the FBI and INS "established that Hamide was organizing fundraising events on behalf of the PFLP at which money was solicited for the stated purpose of supporting the organization's 'fighters.'" Pet. Br. 4. But the district court found that the evidence concerning this event—a widely advertised family style dinner open to the public and attended by more than 1,000 persons—did not support even a reasonable inference that fundraising was for terrorist activities, and defendants did not challenge that finding. Pet. App. 61a-63a, 75a n. 14. In fact, the government's own evidence showed that the funds raised were donated to the United States Organization for Medical and Educational Needs (U.S. OMEN), an IRS-certified tax-exempt humanitarian aid organization. Pet. App. 63a

3. Plaintiffs Are Suffering Irreparable Injury

In addition, the district court found that plaintiffs are suffering irreparable injury as a result of being targeted for deportation in retaliation for exercising their First Amendment rights. Pet. App. 149a, 74a; *see also* Pet. App. 93a-94a. Prior to their arrests, plaintiffs were active participants in the public debate concerning the Middle East and outspoken advocates of Palestinian self-determination. As a direct result of the proceedings, however, plaintiffs, and many others in the Palestinian community, became afraid to engage in even the most basic political activities, including reading magazines, discussing political issues publicly, and supporting the peace process in the West Bank.[8]

C. Litigation Before IIRIRA

In January 1994, the district court first granted a preliminary injunction to six of the eight plaintiffs. Pet. App. 138a.[9] It declined to extend the injunction to plaintiffs Hamide and Shehadeh at that time only because it erroneously concluded that it lacked jurisdiction over their claims. Pet. App. 129a.

The government appealed from the first injunction, and plaintiffs Hamide and Shehadeh cross-appealed from the court's refusal to extend the injunction to them. Despite its earlier concession that the district court had jurisdiction over plaintiffs' claims, the government now argued that the district court lacked jurisdiction, and that plaintiffs could raise their

[8] *See, e.g.*, J.A. 85-86; Dec. of Khader Hamide, Oct. 21, 1993 (deterred from supporting the peace process) (CR 245); Dec. of Amjad Obeid, Apr. 24, 1987 (deterred from reading magazines, speaking publicly, and even participating in Palestinian dance troupe) (CR 15).

[9] In proceedings not at issue here, the district court in 1989 declared the "world communism" provisions unconstitutional. Pet. App. 188a. The government appealed, but while the appeal was pending, Congress repealed the provisions, and the court of appeals then reversed for lack of a justiciable controversy. Pet. App. 166a, 187a.

First Amendment claims only in connection with a petition for review of a final deportation order.

In November 1995, the court of appeals unanimously affirmed the initial preliminary injunction. It ruled that the district court had jurisdiction over plaintiffs' selective enforcement claims because those claims were not cognizable under the otherwise exclusive judicial review procedure set forth in 8 U.S.C. § 1105a. The court concluded that because appellate review under § 1105a is limited to the administrative record, 8 U.S.C. § 1105a(a)(4), and plaintiffs' selective enforcement claims required factual development beyond the administrative record, plaintiffs' claims could not be addressed on appellate review of a final deportation order. For the same reason, the court rejected the government's argument that a court of appeals could transfer the claims to a district court for factfinding under the Hobbs Act, 28 U.S.C. § 2347(b)(3)—facts developed in district court could not be considered on appellate review limited to the administrative record. Pet. App. 91a. Following this Court's directive that where a claim is not cognizable under 8 U.S.C. § 1105a, the alien's remedies "lie first in an action brought in an appropriate district court," *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968), the court held that the district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 8 U.S.C. § 1329. Pet. App. 87a. For the same reasons, the court found that the district court had jurisdiction over Hamide and Shehadeh's claims. Pet. App. 95a-97a.

The court also found that plaintiffs' claims were ripe prior to a final deportation order. Plaintiffs were suffering irreparable injury to their First Amendment rights every day, their claims would not be addressed by the administrative proceedings or appellate review thereof, and delaying review would deny plaintiffs any redress for ongoing constitutional injuries. Pet. App. 85a-95a. As the court stated, "the chill to [plaintiffs'] First Amendment rights is an irreparable injury

that cannot be vindicated by post-deprivation review." Pet. App. 92a.

On the merits, the court of appeals held that plaintiffs are entitled to First Amendment protection as persons living in the United States, and that the government could not target them based on PFLP associational activity unless it showed that their association was " 'knowing' " and with " 'specific intent to further [the PFLP's] illegal aims.' " Pet. App. 108a (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

The government sought no further review of this decision. On remand, however, it submitted over 10,000 additional pages of evidence, and moved to vacate the existing preliminary injunction. Plaintiffs Hamide and Shehadeh moved to extend the injunction to their cases. In April 1996, the district court found no "changed circumstances" to justify vacating the existing preliminary injunction; all the evidence could have been presented when the injunction was first adjudicated. Pet. App. 55a n.6. The district court nonetheless examined all of the new evidence, but found nothing "that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14.[10] Accordingly, the court denied the

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[10] Contrary to defendants' implications, Pet. Br. 11-12 n.6, the district court did not reject any of defendants' evidence on evidentiary grounds, nor did it require defendants to "follow the trail of the money" to establish specific intent. While it noted numerous problems with defendants' submission—including the fact that it was unclear that much of the evidence had been presented to the INS, or that it even existed, at the time the INS instituted deportation proceedings against plaintiffs (Pet. App. 58a, 62a)—the court considered all of the evidence. Pet. App. 56a, 60a. And while the court did note that the FBI had made no attempt to follow the money raised on behalf of a tax-exempt charitable institution, it did so simply to underscore by contrast what it found to be "a recurring feature of the government's submission[:] the making of conclusory assertions without any supporting evidence." Pet. App. 68a. It did not in any way suggest that such evidence was necessary to show specific intent.

motion to vacate and extended the injunction to Hamide and Shehadeh. Defendants appealed once again.

D. The Illegal Immigration Reform And Immigrant Responsibility Act Of 1996

While the second appeal was pending, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009. Among other things, IIRIRA enacted new judicial review procedures for future "removal" cases, and modified to some extent existing procedures for review of deportation and exclusion orders.

IIRIRA's new judicial review provision, 8 U.S.C. § 1252 (Supp. II 1996), retains the basic structure set forth under former 8 U.S.C. § 1105a (1994). Appellate review of final orders of removal remains governed by the procedures of the Hobbs Act, subject to a set of specified exceptions. 8 U.S.C. § 1252(a). As under § 1105a, one of the exceptions requires that the appeal be decided "only on the administrative record on which the order is based." 8 U.S.C. § 1252(b)(4). A new provision, § 1252(f), sets limits on injunctive relief, but expressly acknowledges the propriety of such relief "with respect to the application of [the removal provisions] to an individual alien against whom proceedings under such [removal provisions] have been initiated." Finally, just as former § 1105a(a)(1) provided that its jurisdictional scheme was "sole and exclusive," so new § 1252(g) provides that the new jurisdictional scheme set forth in § 1252 is "exclusive."[11]

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[11] 8 U.S.C. § 1252(g) (Supp. II 1996) provides:

> Exclusive Jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Congress further preserved the status quo by providing that for the most part, its IIRIRA amendments would not apply to deportation cases pending on April 1, 1997, the statute's effective date. IIRIRA, § 309(c)(1), 8 U.S.C. § 1101 note (Supp. II 1996). Review of pending cases continues to be governed by the former 8 U.S.C. § 1105a, subject to limited changes not pertinent here, unless the Attorney General elects to invoke the new judicial review procedures in any given case.[12] In light of this latter possibility, Congress provided that IIRIRA's "exclusive jurisdiction" provision, § 1252(g), "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." IIRIRA, § 306(c), 8 U.S.C. § 1252 note.

E. Litigation After IIRIRA

The government concedes that because plaintiffs' deportation cases were pending on April 1, 1997, most of IIRIRA's judicial review amendments do not apply. Pet. Br. 29-30. Nonetheless, invoking only the "exclusive jurisdiction" provision of IIRIRA, § 1252(g), the government filed a new motion to dismiss in the district court and a supplemental brief in the court of appeals, arguing that this provision divested the courts of jurisdiction.

Both the district court and the court of appeals rejected the government's reading of § 1252(g), reasoning that it would

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[12] Section 309(c)(1) of IIRIRA provides that "[subject] to the succeeding provisions of this subsection," "the amendments made by this subtitle shall not apply" to pending cases, and "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." IIRIRA, § 309(c)(1), 8 U.S.C. § 1101 note. The "succeeding provisions" permit the Attorney General to elect to invoke the new law (including the judicial review provisions) in pending cases. IIRIRA, § 309(c)(2), (3). In addition, they outline limited "[t]ransitional changes in judicial review" that apply to judicial review of pending cases where the final order of deportation or exclusion is entered more than 30 days afer IIRIRA's enactment. IIRIRA, § 309(c)(4).

deprive plaintiffs of *any* federal forum to litigate substantial First Amendment claims. Both courts once again found that plaintiffs would not be able to raise their selective enforcement claims on appellate review of a deportation order, because appellate review is limited by statute to the administrative record. Pet. App. 12a-13a, 40a-42a. For the same reason, both courts again rejected the government's suggestion that plaintiffs' claims could be developed through a transfer to district court under the Hobbs Act. Pet. App. 12a-13a, 42a. And both courts found that even if review were somehow available after the administrative process concluded, that avenue would deny plaintiffs any forum to redress their ongoing irreparable injuries to their First Amendment rights. Pet. App. 14a-15a, 38a-40a.

Accordingly, both courts followed the mandate that jurisdictional statutes should be read to preserve review of constitutional claims by construing IIRIRA to preserve district court jurisdiction for constitutional challenges, such as plaintiffs', for which there was otherwise no adequate review. Pet. App. 22a-43a; 6a-15a. The district court reasoned that because Congress did not specify that it intended § 1252(g) to bar all review of constitutional claims, and because plaintiffs' claims could not otherwise be reviewed, § 1252(g) should be intepreted not to apply to such claims. Pet. App. 42a.

The court of appeals took a different tack. It found that the government's reading of the statute, which would have § 1252(g) apply to pending cases without the rest of § 1252, would have the "absurd result" of barring all review of deportation orders in pending cases. Pet. App. 9a. Section 1252(g) bars judicial review "*[e]xcept as provided in this section.*" 8 U.S.C. § 1252(g) (emphasis supplied). Since the government concedes that the rest of "this section," namely § 1252(a)-(f), does not apply to pending cases, § 1252(g) applied alone becomes a nullification of all review of pending deportation and exclusion cases. Pet. App. 11a. To avoid this result, the court of appeals held that "when it applies to pending cases,

(g) must apply along with at least some of the other provisions of section 1252, as amended by IIRIRA." *Id.* In particular, it held that § 1252(f) preserves jurisdiction over plaintiffs' claims, because it permits injunctive relief on behalf of "an individual alien against whom proceedings . . . have been initiated." 8 U.S.C. § 1252(f).

On the merits, the court of appeals upheld the injunction once again. It affirmed the district court's conclusion that no "changed circumstances" justified vacating the initial preliminary injunction. Pet. App. 17a. And it affirmed the extension of the injunction to Hamide and Shehadeh, based on the district court's unchallenged factual findings. Pet. App. 18a-21a.

This case has had a long and tortuous path. The government and its amici repeatedly imply that the delays in the deportation proceedings are attributable to the federal district court litigation, but that is demonstrably false. The *only* delay attributable to a federal court injunction began in April 1996, when the injunction was extended to Hamide and Shehadeh. The deportation proceedings began in 1987; the district court did not enjoin any deportation proceedings until 1994. The first injunction did not cause any delay, because it covered only the six plaintiffs other than Hamide and Shehadeh, and the government had already decided to defer the others' hearings until Hamide and Shehadeh's deportation hearing was completed. Yet in 1996, after nine *injunction-free* years, the INS had completed only one-quarter of Hamide and Shehadeh's deportation hearing. The delays in Hamide and Shehadeh's hearing, in turn, were caused by the INS's shifting charges, its delays in producing exculpatory evidence ordered by the immigration judge, and Congress's changes to the immigration laws, and not, as the government and its amici imply, by the federal injunction now under review.[13]

[13] Indeed, the government is also responsible for much of the delay in the federal district court litigation. For example, the government chose as a matter of strategy to litigate and appeal the preliminary injunction

SUMMARY OF ARGUMENT

The undisputed findings in this case establish that the INS instituted deportation proceedings against plaintiffs in retaliation for their exercise of core First Amendment rights of political association. Plaintiffs sought injunctive relief in district court because they were suffering irreparable injuries, and because the district court was the *only* forum that could even address their claims, which required factual development beyond the administrative record. *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991); *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968).

Despite its initial concession that district court jurisdiction was proper, the government now argues that the federal courts have always been barred from providing plaintiffs in deportation proceedings with injunctive relief. In the government's view, an immigrant targeted for deportation because of her race, her gender, or her expression of religious beliefs must submit to years of administrative proceedings and irreparable injury before she may even present her constitutional claims to a court.

The government concedes that plaintiffs' claims must be subject to judicial review, that the claims require factual development that cannot be accomplished in an immigration proceeding, and that notwithstanding the enactment of IIRIRA, review of plaintiffs' deportation proceedings remains

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in two stages, initially presenting only some of its evidence, and only after losing on appeal presenting some 10,000 additional pages, all of which could have been presented the first time around. Pet. App. 17a, 55a n.8. In addition, the government has delayed the discovery process by withholding clearly relevant evidence, only later submitting it as part of its own case. Pet. App. 52a-55a. This Court has stated that, ordinarily, delays in immigration cases benefit the alien, *INS v. Doherty*, 502 U.S. 314, 323 (1992), but that is certainly not the case here, where plaintiffs have been denied the right to engage in protected political activity for years, and need access to government records and officials to discover the facts necessary to vindicate their rights.

governed by former 8 U.S.C. § 1105a. Thus, unless courts of appeals under former § 1105a have jurisdiction to review claims requiring factual development outside the administrative record, the government's argument would leave plaintiffs with no forum to address constitutional claims, a result it admits is unacceptable.

In fact, because § 1105a limits appellate review of a deportation order to the administrative record created by the INS, claims requiring factfinding beyond the record are not cognizable under § 1105a, and must be filed in an original district court action. The government argues that appellate courts could transfer such claims to a district court for factfinding under the Hobbs Act, 28 U.S.C. § 2347(b)(3), but the same "administrative record" limitation precludes such transfers. As every court to address the question has held, facts developed by a district court would by definition be outside the administrative record, and therefore could not form the basis for appellate review under § 1105a.

Moreover, the transfer mechanism that the government proposes here was considered and *rejected* by Congress in enacting IIRIRA. Congress deleted a provision from the Senate bill that would have authorized district court transfers in the very situation presented here—constitutional claims requiring factfinding beyond the administrative record. Instead, it reenacted the "administrative record" language that had been uniformly interpreted to bar such transfers.

In addition, the government's proposal to re-route all claims requiring factfinding beyond the administrative record through a court of appeals before being transferred back to a district court would serve the purposes of neither the Hobbs Act nor the INA. It would require courts of appeals to do the work of trial courts, admitting and assessing evidence in the first instance on a regular basis, in order to determine whether a transfer is warranted. And it would only further delay the resolution of immigration cases. Collateral claims

now resolved in district court would still be litigated in district court, but only *after* an extra layer of threshold review in the court of appeals.

Even if plaintiffs' claims could somehow be considered on appellate review of a final deportation order, relegating plaintiffs to that post-deprivation remedy would still deny them meaningful review of their constitutional claims. Plaintiffs are suffering ongoing irreparable injury to their First Amendment rights. As long as they know the government has targeted them for their political associations and activities, they (and many others in the Palestinian community) are chilled from engaging in those activities, including such basic political rights as distributing literature, recruiting supporters, and communicating with associates. This Court has consistently recognized the necessity for timely judicial review where government action potentially infringes on First Amendment rights, and more generally, where irreparable injuries will otherwise go unredressed. In this context, review delayed is review denied.

IIRIRA does not change these conclusions. Because the government concedes that judicial review of plaintiffs' deportation proceedings is governed by former § 1105a, IIRIRA plays little or no independent role in this case. The government nonetheless maintains that a single provision of IIRIRA, 8 U.S.C. § 1252(g), applies here and bars district court jurisdiction. That reading must be rejected, because it would both deny meaningful judicial review of a constitutional claim and render the statute incoherent. Section 1252(g), entitled "Exclusive Jurisdiction," bars review of claims arising from "decisions to commence proceedings, adjudicate cases, or execute removal orders" except as provided "in this section." Yet on the government's reading, § 1252(g) would apply to pending cases without the remainder of the section, § 1252(a)-(f), to which it refers. On that reading, it literally becomes a nullification of all jurisdiction.

Plaintiffs' interpretation of § 1252(g), by contrast, preserves review of claims that cannot be adequately addressed on appellate review, and makes sense of § 1252(g). Plaintiffs maintain that § 1252(g) was intended to apply to claims arising from pending deportation proceedings only where the Attorney General invokes the whole of the new § 1252 judicial review scheme pursuant to §§ 309(c)(2) and (c)(3) of IIRIRA. When she does so, § 1252(g) applies retroactively, "without limitation to claims arising from all past [and] pending" proceedings. On this reading, § 1252(g) applies only when the rest of § 1252 applies, and the statute operates as the "exclusive jurisdiction" Congress intended, rather than as a negation of jurisdiction that no one could have intended.

Alternatively, if § 1252(g) is read to apply to pending cases, it must be interpreted not to bar judicial review of constitutional claims that cannot otherwise be meaningfully reviewed. Section 1252(g) does not expressly refer to constitutional claims, and there is no "clear and convincing evidence" that Congress intended to bar review of constitutional claims in pending cases. Both of these readings are reinforced by analysis of the whole of § 1252, which codifies the approach that this Court and lower courts consistently took under § 1105a in finding district court jurisdiction proper where claims could not be adequately addressed under § 1105a itself.

Plaintiffs' interpretation will neither open the floodgates to district court litigation, nor delay immigration processing. It applies only to a narrow set of cases, those instituted prior to April 1, 1997. And it simply maintains the status quo. Under uniform judicial interpretation of § 1105a, the vast majority of issues arising in deportation proceedings were reviewable exclusively in the court of appeals. Only those issues that could not be adequately reviewed on a petition for review could be litigated in district court. That scheme has not imposed an undue burden on the courts, nor led to unwarranted delays, and Congress in IIRIRA made no suggestion that it disapproved of that scheme.

ARGUMENT

I. THE APPLICABLE STATUTES SHOULD BE INTERPRETED TO PRESERVE MEANINGFUL JUDICIAL REVIEW OF PLAINTIFFS' CONSTITUTIONAL CLAIMS

The issue presented for review is whether, in light of IIRIRA, immigrants who have been targeted for deportation in retaliation for exercising constitutionally protected rights of speech and association have the right to seek timely judicial relief from a district court.[14] The government concedes that plaintiffs' constitutional claims must be reviewable, Pet. Br. 36, that judicial review of plaintiffs' deportation proceedings is still governed by former 8 U.S.C. § 1105a, Pet. Br. 30-31 n.15, and that plaintiffs' claims require factfinding that cannot be accomplished through the administrative process. Pet. Br. 38. But as both lower courts held, claims requiring factfinding beyond the administrative record *cannot* be reviewed under § 1105a, and therefore unless plaintiffs can bring an original action in district court pursuant to 28 U.S.C. § 1331 and 8 U.S.C. § 1329, they will be deprived of any forum whatsoever to resolve substantial constitutional claims.

A " 'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Accord-

[14] Every judge to review the record has agreed that plaintiffs are likely to succeed on their claim that the government selectively targeted them in violation of the First Amendment. The government sought certiorari on that issue, but that issue is not presented here because the Court limited its grant to the jurisdictional issue. Even in the absence of the unanimous judicial assessment of plaintiffs' First Amendment claims, the Court would have to assume that plaintiffs' allegations are true for purposes of deciding the jurisdictional issue presented here. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

ingly, absent "clear and convincing evidence" to the contrary, jurisdictional statutes must be construed to preserve meaningful review of constitutional claims. *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). In *Johnson*, for example, this Court interpreted a statute that on its face barred *all* judicial review of veterans' benefits determinations to permit judicial review of constitutional challenges arising from benefits claims.[15] As one commentator has described it, the Court employs "a superstrong presumption against preclusion of constitutional claims." Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 730-31 (1990).

The government asserts that this doctrine is not directly implicated here because under its reading of § 1105a, plaintiffs may obtain judicial review of their First Amendment claims on appeal of a final deportation order, and can develop the necessary facts through a transfer to district court under an obscure provision of the Hobbs Act, 28 U.S.C. § 2347(b)(3). But § 1105a and the Hobbs Act both preclude use of the transfer mechanism in review of deportation orders. Moreover, in enacting IIRIRA, Congress considered and rejected the very transfer mechanism the government now urges the Court to find was always available—a district court transfer for constitutional claims requiring factual development beyond the administrative record. *See infra* Section I.A.2. Thus, the only mechanism for factfinding the government has identified is unavailable, and to deny district court review would in fact preclude *all* review of plaintiffs' constitutional claims.

Even if review at the end of the administrative process were available, the government's position would still raise serious

[15] *Id.* at 365; *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 n.3 (1985) (same); *Webster v. Doe*, 486 U.S. 592 (1988) (interpreting the National Security Act of 1947, which appeared to preclude all judicial review of CIA employment decisions, to preserve review of constitutional challenges to such decisions).

constitutional questions. Because plaintiffs are suffering irreparable injuries to their First Amendment rights now, meaningful judicial review cannot be afforded years later. *See infra* Section I.B.

A. Meaningful Judicial Review Requires District Court Jurisdiction Because Plaintiffs' Claims Require Factual Development Beyond The Administrative Record

The first reason that plaintiffs' claims must be heard in district court is that plaintiffs have nowhere else to go. As the record below—already exceeding 11,000 pages of evidence at the preliminary injunction stage—illustrates, plaintiffs' claims require extensive factual development. Much of this evidence was produced in court-ordered discovery, including voluminous government documents confirming that plaintiffs were targeted for constitutionally protected associational activity. As the government admits, these facts cannot be developed in the immigration proceeding because immigration judges have no authority to review the District Director's discretionary decision to institute deportation proceedings. *See supra* note 3. Because appellate review is limited to the administrative record, these claims also cannot be reviewed by a court of appeals on review of a final deportation order under 8 U.S.C. § 1105a. For that reason, as the government originally conceded, *see supra* note 2, jurisdiction lies in district court.

1. Under The Uniform Judicial Interpretation Of 8 U.S.C. § 1105a, District Courts Have Jurisdiction To Review Claims That Require Factfinding Beyond The Administrative Record

The government concedes that 8 U.S.C. § 1105a (1994), which governed review of deportation proceedings when this case began, still governs judicial review of plaintiffs' deportation cases, because they were commenced prior to April 1, 1997. Pet. Br. 12, 17, 30-31 n.15.[16] Under Section 1105a, it is well established—indeed uniformly held—that claims requiring factfinding beyond the administrative record cannot be reviewed on appeal of a deportation order, and therefore are appropriately heard only in district court.

Section 1105a establishes "sole and exclusive" jurisdiction in the court of appeals for all claims that can be heard on review of a final order of deportation. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 209-10 (1968). But where an alien asserts a claim that is beyond the scope of appellate review under § 1105a, "the provisions of [§ 1105a] are inapplicable, [and]

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[16] This concession suggests that certiorari may have been improvidently granted. In granting certiorari, this Court specifically rewrote the question presented to ask whether, "*in light of [IIRIRA*], the courts below had jurisdiction to entertain respondents' challenge prior to the entry of a final order of deportation." 118 S. Ct. 2059 (1998) (emphasis added). But it is now clear that even on the government's view, IIRIRA has little or no effect on this case, as review of plaintiffs' claims is still governed by the former § 1105a. The only relevant IIRIRA provision that the government even claims applies here is 8 U.S.C. § 1252(g), and the government maintains that that provision does not change anything, but merely "reinforces the rule that judicial review is available to such aliens only as provided in 8 U.S.C. § 1105a itself." Pet. Br. 30-31 n.15. Thus, this case does not present the issue of how IIRIRA applies prospectively, and the government's case stands or falls on whether there is adequate review of plaintiffs' claims under former § 1105a. The case may therefore not present the question the Court thought it did when it granted certiorari, and if so, certiorari should be dismissed as improvidently granted.

the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Id.* at 210.[17]

One category of challenges not cognizable on a § 1105a petition for review, and therefore cognizable only in district court under 28 U.S.C. § 1331 and 8 U.S.C. § 1329, are claims requiring factfinding beyond the administrative record. A court of appeals cannot review such claims because its determination must be based "solely upon the administrative record upon which the deportation order is based." 8 U.S.C. § 1105a(a)(4).[18]

This Court so held in *McNary v. Haitian Refugee Center*, 498 U.S. 479, 497 (1991). The statute at issue limited appeals of legalization decisions to petitions for review of final deportation orders under § 1105a. The Court held that this exclusive appellate review scheme did not apply to a challenge to the INS's procedures and practices in adjudicating legalization applications, because the challenge required factual development beyond the scope of the administrative process. Noting that the statute required appellate review to be "based solely upon the administrative record," the Court held that "[b]ecause the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims [to the court of appeals] is not contemplated by the language of [the statute]." 498 U.S. at 493. Thus, if "not allowed to pursue their claims in District Court, respondents would not as a practical matter be able to obtain meaningful judicial review." *Id.* at 497.

Like the claims in *McNary*, plaintiffs' claims require factfinding beyond the administrative record, and therefore cannot be reviewed under § 1105a; consequently, they are properly cognizable in district court. The law on this question was so well settled that the government acknowledged that district court jurisdiction was proper when this case began. Reversing itself, the government now argues that § 1105a has always precluded district court review. Pet. Br. 20-24. But remarkably, it cites only *one* immigration case for this proposition, *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996), and that case supports plaintiffs' view. The court in *Massieu* held that a facial constitutional challenge to an immigration statute could be heard on appellate review under § 1105a because it required no factfinding beyond the administrative record. 91 F.3d at 422-24. In doing so, the court cited and followed *McNary* and its own prior decision in *Yi v. Maugans*, 24 F.3d at 506, both of which held that district courts have jurisdiction to hear claims requiring factfinding beyond the administrative record, because such claims *cannot* be heard on § 1105a review.[19]

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[17] *See also INS v. Stanisic*, 395 U.S. 62, 68 n.6 (1969). As the Tenth Circuit explained the unanimous state of the law under § 1105a:

> [T]he current state of the law concerning review of deportation decisions is that, if the tests are met for review by this court under [§ 1105a], the district court has no jurisdiction to review such issues. If the issues do not meet the jurisdictional tests of [§ 1105a], we have no authority to review them under auspices of that section, and *exclusive* jurisdiction for initial review of those issues lies in the district court.

Olaniyan v. District Director, INS, 796 F.2d 373, 376-77 (10th Cir. 1986) (original emphasis); *see also Gottesman v. INS*, 33 F.3d 383, 387 (4th Cir. 1994) (same) (collecting cases); *Fatehi v. INS*, 729 F.2d 1086, 1088 (6th Cir. 1984).

[18] *See, e.g., Yi v. Maugans*, 24 F.3d 500, 506 (3d Cir. 1994); *Olaniyan v. District Director, INS*, 796 F.2d at 376; *Abedi-Tajrishi v. INS*, 752 F.2d 441, 443-44 (9th Cir. 1985); *Jean v. Nelson*, 727 F.2d 957, 980-81 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985); *Mahammadi-Motlagh v. INS*, 727 F.2d 1450, 1452-53 (9th Cir. 1984); *Tooloee v. INS*, 722 F.2d 1434, 1437 (9th Cir. 1983); *Fleurinor v. INS*, 585 F.2d 129, 135-36 & n.6 (5th Cir. 1978).

[19] The Third Circuit's opinions are consistent with *INS v. Chadha*, 462 U.S. 919 (1983), which authorized appellate review under § 1105a of a facial challenge to a legislative veto provision, a claim which, like *Massieu* and unlike *McNary* and this case, required no factfinding beyond the administrative record.

Thus, under § 1105a, which the government concedes still governs judicial review of plaintiffs' deportation cases, the courts have uniformly held that claims requiring factual development beyond the administrative record cannot be heard on direct appellate review of a deportation order, and must therefore be filed in district court.

2. Under Both 8 U.S.C. § 1105a and IIRIRA, Courts Of Appeals May Not Transfer Claims Requiring Factfinding Beyond The Administrative Record To District Courts For Factfinding

Notwithstanding its earlier concession and the above uniform precedent, the government now argues that claims requiring factfinding are cognizable only on § 1105a appellate review of a final deportation order, and that any factual development can be obtained through a transfer to district court under a rarely used provision of the Hobbs Act, 28 U.S.C. § 2347(b)(3). The government's argument fails for four reasons.

First, § 1105a precludes the district court transfer that the government now suggests would be available. Although § 1105a directs that appeals of deportation orders are to be conducted pursuant to Hobbs Act procedures, it does so subject to the specific qualification that, except for nationality claims, "the petition shall be determined solely upon the administrative record upon which the deportation order is based." 8 U.S.C. § 1105a(a)(4). As every court to address the issue has held, that qualification precludes a court of appeals from transferring a matter to district court for factual development.[20] Any facts developed in district court would by

[20] *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997) (Pet. App. 12a-13a); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1057 (9th Cir. 1995) (Pet. App. 91a); *Ghorbani v. INS*, 686 F.2d 784, 787 n.4 (9th Cir. 1982) (statutory provision limiting appellate review to the administrative record

definition be outside the administrative record, and therefore could not form the basis for an appellate court's decision under § 1105a(a)(4). Not surprisingly, this provision has *never* been used in appellate review of a deportation order, even though such appeals have been subject to the Hobbs Act since 1961, when Congress enacted § 1105a.

This reading is buttressed by the fact that the only exception § 1105a makes to the requirement that petitions be determined "solely upon the administrative record" is for nationality claims. 8 U.S.C. § 1105a(a)(4). These claims are to be transferred to a district court for factfinding. 8 U.S.C. § 1105a(a)(5). Thus, where Congress intended to provide for transfers to district court, it did so explicitly. It pointedly did not authorize such transfers for issues requiring factfinding beyond the administrative record, as the government now advocates.

If the government's view of § 1105a were correct, all of the cases discussed above finding district court jurisdiction available for claims requiring factfinding beyond the administrative record would have been wrongly decided, including *McNary*, 498 U.S. 479. *See supra* Section I.A.1. On the government's view, the court of appeals would have had exclusive jurisdiction under § 1105a, and the facts could have been developed *only* on a Hobbs Act transfer to district court. In *McNary*, the government made precisely this argument, citing the Hobbs Act transfer provision as the proper mechanism for developing necessary facts. Reply Br. for Petitioners in *McNary* at 9. Yet the Court was unpersuaded, and held that limiting plaintiffs to the § 1105a appeal process would be "the

"precludes application of the procedures of the Hobbs Act that permit transfer of a case to a district court for a hearing"); *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977); *see also Osaghae v. INS*, 942 F.2d 1160, 1162 (7th Cir. 1991) (statutory provision limiting appellate review to the administrative record means that "we are not to take evidence and base our decision on some mixture of that evidence with the evidence that was before the Board"); *Makonnen v. INS*, 44 F.3d 1378, 1385 (8th Cir. 1995) (same).

practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." 498 U.S. at 497.

Second, in enacting IIRIRA, Congress expressly rejected a proposal to permit district court transfers for constitutional claims, and instead re-enacted the very language that the courts had interpreted to bar such transfers. The version of the bill passed by the Senate contained the following provision:

> If a petition filed under this section raises a *Constitutional issue that the court of appeals finds presents a genuine issue of material fact that cannot be resolved on the basis of the administrative record*, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides or is detained for a new hearing on the Constitutional claim as if the proceedings were originally initiated in district court.

S. 1664, § 142(a) (passed by Senate, May 2, 1996) (emphasis added). The House bill did not contain this provision, however, and the Conference Committee deleted it. Thus, against a backdrop of consistent judicial decisions holding that § 1105a's "administrative record" language barred transfers to district court, Congress expressly rejected a proposal to authorize such transfers *for constitutional issues*—the very proposal the government now urges this Court to adopt as a matter of statutory construction. " 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).[21]

[21] *See also Lonchar v. Thomas*, 517 U.S. 314, 327 (1996) (courts should not read habeas statute to impose a requirement that Congress expressly "*rejected*, by removing [it] from the draft Rule") (original emphasis); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (rejecting proffered interpretation of statute where legislative history indicated that Congress had considered and rejected that approach).

Moreover, in rejecting the transfer proposal for constitutional issues, Congress re-enacted the language that courts had uniformly interpreted to bar district court transfers, *see* 8 U.S.C. §§ 1252(b)(4), (5), thus adopting that interpretation. "Congress is presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Bragdon v. Abbott*, ___ U.S. ___, 118 S. Ct. 2196, 2208 (1998) (same).[22]

Third, the Hobbs Act itself independently precludes a district court transfer in an appeal from a deportation order. The district court transfer provision was designed to address a very narrow set of final agency orders—those issued without holding a hearing—and therefore permits district court transfers *only* where "the agency has not held a hearing" and "a hearing is not required by law." 28 U.S.C. § 2347(b)(3). Since § 1105a(a) adopts Hobbs Act procedures only for "judicial review of all final orders of deportation," and a hearing is "required by law" before a deportation order is entered,

[22] The government is left to argue that a negative inference in support of its view should be drawn from IIRIRA's provision barring remands to the agency under 28 U.S.C. § 2347(c). 8 U.S.C. § 1252(a)(1). Pet. Br. 46-47. Even if such an inference were warranted, it would hardly overcome Congress's explicit rejection of the transfer option and re-enactment of the "administrative record" language. In any event, as the court of appeals explained, the inference is wholly unwarranted. Pet. App. 13a-14a. The reason Congress specifically barred remands to the INS under § 2347(c) without mentioning transfers to district court under § 2347(b)(3) is simple—the state of the law was that § 2347(b)(3) transfers to the district court were already barred by the "administrative record" language, but remands to the agency under § 2347(c) were permitted (over INS's objections). *See, e.g., Makonnen*, 44 F.3d at 1385; *Osaghae*, 942 F.2d at 1162; *Coriolan*, 559 F.2d at 1003. Since § 2347(b)(3) transfers were already unavailable, Congress needed to do no more than re-enact the "administrative record" limitation.

8 U.S.C. § 1252(b), the Hobbs Act itself bars a transfer to district court in this setting.[23]

Fourth, channeling collateral challenges through § 2347(b)(3) would also undermine Congress's purposes in enacting both the Hobbs Act and the INA. The Hobbs Act transferred appeals of administrative agency orders from three-judge district courts to the courts of appeals because such appeals generally do not require independent factual development. S. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950). Section 2347(b)(3) was added only for the rare situation in which an agency issued a reviewable order without holding a hearing, the law did not require a hearing, and there were facts in dispute—a situation so rare that it has happened only once in the thousands of appeals that have been decided in the almost 50 years since the Hobbs Act became law.[24] On the government's view, however, deciding whether to transfer a matter under § 2347(b)(3) would become a routine part of appellate courts' work in immigration cases. Every time a collateral issue arose—and as *Cheng Fan Kwok*'s progeny illustrates, there are many such issues—appellate courts would have to assess newly presented evidence in the first instance, presumably sometimes including oral testimony, in order to determine whether to transfer to district court for factfinding. In this

[23] For the same reason, the Hobbs Act's requirement that review be limited to the administrative record is quite different from the INA's requirement. *Cf.* Pet. Br. 47 n.22. The Hobbs Act limits review to the administrative record only "when the agency has held a hearing," 28 U.S.C. § 2347(a), and permits district court transfers only where there has been no hearing, and no hearing is required by law. 28 U.S.C. § 2347(b)(3). By contrast, the INA limits *all* petitions for review of deportation orders to the administrative record, subject only to a single exception for claims of nationality. 8 U.S.C. § 1105a(a)(4).

[24] *Lake Carriers' Ass'n v. United States*, 414 F.2d 567 (6th Cir. 1969) (transferring to district court where FCC held no hearing before issuing order appealed from, a hearing was not required by law, and there was genuine issue of material fact regarding effect of order on navigational safety).

case, for example, the district court reviewed hundreds of pages of evidence before authorizing discovery, and reviewed over 11,000 pages before extending the injunction to plaintiffs Hamide and Shehadeh. Admitting and assessing evidence in the first instance is the kind of work suited to trial courts, not courts of appeals.

Nor would § 2347(b)(3) transfers serve Congress's interests in streamlining review of deportation orders. All claims that are now litigated in district court would still be litigated in district court. The government's proposal would simply add an additional layer of review and delay, by requiring courts of appeals to routinely make threshold determinations to transfer. In this case, for example, since plaintiffs have already established a *prima facie* case that they have been singled out in retaliation for First Amendment activities, a § 2347(b)(3) transfer would be inevitable. Thus, they would be back in district court, precisely where they are today, only years later. During the delay, moreover, not only would plaintiffs suffer irreparable injuries, but they would almost certainly lose access to valuable evidence, thereby prejudicing their ability to prove their claims.[25]

[25] In the unlikely event that plaintiffs' deportation proceedings were resolved in their favor on statutory grounds, the government's proposal would afford them no opportunity to vindicate their constitutional rights. Plaintiffs allege that the government has targeted them in retaliation for their First Amendment activities. Since the government has stated that it seeks their deportation because of their political associations, and would remain free to institute future deportation proceedings against them, plaintiffs would be entitled to an injunction barring the government from bringing any future proceedings against them in retaliation for their First Amendment activities even if they were to prevail in the current deportation proceedings on statutory grounds.

B. Meaningful Judicial Review Requires Timely Access to District Court Because Plaintiffs Are Suffering Irreparable Injuries To Their First Amendment Rights

Even if plaintiffs' claims could be addressed after entry of a final deportation order, such a remedy would be insufficient where, as here, the proceedings were instituted in retaliation for the exercise of First Amendment rights. Such review is patently inadequate, because it would leave plaintiffs with no judicial recourse for their irreparable First Amendment injuries for the many *years* that the administrative process takes.[26] "[T]he loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because plaintiffs' First Amendment irreparable injuries "cannot be vindicated by post-deprivation remedies," timely judicial review is required here. Pet. App. 92a, 14a-15a.

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[26] Plaintiffs Hamide and Shehadeh's deportation hearing alone has already lasted many years and was less than one-quarter completed when the district court enjoined it in 1996. Immigration hearings routinely take many years to complete from the issuance of the Order to Show Cause, and appeals to the BIA also frequently take many years. *See, e.g. Rodriguez-Barajas v. INS*, 992 F.2d 94, 97 (7th Cir. 1993) (noting that BIA did not explain nearly seven-year delay in deciding administrative appeal); *Osmani v. INS*, 14 F.3d 13, 14 (7th Cir. 1994) (BIA took four years to decide administrative appeal, and four more years to decide motion to reopen); *Ghaly v. INS*, 58 F.3d 1425, 1428 (9th Cir. 1995) (BIA dismissed appeal "after six years of inexplicable delay"); *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995) (Posner, J.) (noting that BIA is chronically understaffed, and that INS proceedings are "notorious for delay"); *id.* at 452 (Easterbrook, dissenting) (noting that delay in deporting Salameda was 13 years "and counting"). Hamide and Shehadeh's case, which has already generated more than 6,000 transcript pages and hundreds of exhibits, is far more complex than the average deportation case, and is therefore likely to take even longer than usual to resolve. And because the other plaintiffs' deportation hearings will follow Hamide and Shehadeh's proceeding, the delay for them will be even longer.

Few principles are more basic to First Amendment jurisprudence than the notion that First Amendment claims require prompt judicial review. The Court has held that the failure to provide prompt judicial review invalidates state procedures for regulating obscenity and allocating access to a municipal theater.[27] The same principle has led the Court to interpret the statute limiting its own jurisdiction, 28 U.S.C. § 1257, to permit review of otherwise non-final judgments where leaving important First Amendment issues unresolved would chill protected expression.[28] Similar concerns explain the Court's willingness to entertain pre-enforcement challenges to overbroad statutes that threaten speech and assocational rights.[29]

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[27] *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-62 (1975). As the government notes, the retaliatory filing of deportation charges is not, strictly speaking, a prior restraint. Pet. Br. 42. But such retaliatory action has many of the same effects and should raise the same concerns as do prior restraints. Instituting civil deportation proceedings is even easier than seeking a civil injunction against speech, and therefore at least equally subject to abuse as a formal prior restraint. No less than an injunction, seizure, or permit denial, the institution of deportation charges based on political activities for all practical purposes prospectively bars the individuals targeted (and others associated with them) from engaging in such activities. And because the immigration judge cannot review the selective enforcement claims, plaintiffs are left without recourse to adjudicate their First Amendment rights.

[28] *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55-57 (1989); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246-47 & n.6 (1974); *Mills v. Alabama*, 384 U.S. 214, 221-22 (1966) (Douglas, J., concurring).

[29] *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) (First Amendment overbreadth doctrine is based on concern that "[a]n overbroad statute might serve to chill protected speech"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (under First Amendment overbreadth doctrine, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

Each of these doctrines is predicated on the recognition that First Amendment rights are easily deterred, that the rights of all of us are diminished if some are chilled from protected expression, and that timely judicial resolution is therefore constitutionally required.[30]

The Court acknowledged that this principle applies to judicial review of administrative agency actions threatening First Amendment rights in *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968). Section 10(b)(3) of the Selective Service Act barred any judicial review of a selective service classification decision prior to induction. Oestereich, a theology student, claimed that the Selective Service Board had illegally reclassified him for returning his draft card to protest the Vietnam War. The Court held that pre-induction review was warranted because the Board's "basically lawless" decision was "no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered . . . to retaliate against the person because of his political views." 393 U.S. at 237. Two unanimous courts of appeals came to the same conclusion, including the Second Circuit, in a decision joined by Judge Friendly. *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817, 823 (2d Cir. 1967) (holding that pre-induction review was necessary where individuals were reclassified in retaliation for their speech because "[t]he effect of the reclassification itself is immediately to curtail the exercise of First Amendment rights."); *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1108-15 (D.C. Cir. 1969) (same).

The necessity of prompt judicial review for First Amendment claims also informs this Court's *Younger* abstention

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[30] *See generally* Henry Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 550-51 (1970) ("the view that the first amendment has important remedial consequences for the federal courts also necessarily calls into question the validity of congressionally imposed jurisdictional limitations in the first amendment area").

jurisprudence. *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention, which holds that federal courts should not enjoin ongoing state criminal, civil and administrative proceedings furthering vital state interests, applies *only if the state proceedings afford an opportunity to present the individuals' constitutional claims*. Thus, in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 435-36 (1982), the Court extended *Younger* abstention to a state disciplinary proceeding only upon finding that the lawyer subject to discipline had an adequate opportunity to resolve his First Amendment claims within the disciplinary proceedings. The " 'pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims.' " *Id.* at 432 (quoting *Moore v. Sims*, 442 U.S. 415, 430 (1979)). Where constitutional claims cannot be presented in the state proceeding, abstention is improper. *See, e.g. Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (declining to apply *Younger* to civil administrative proceeding, because *Younger* dismissal "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved"); *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (*Younger* does not apply because claim cannot be presented in defense to criminal proceeding).

Even where a state tribunal can consider constitutional challenges, the Court permits federal injunctions where proceedings are brought to retaliate against the exercise of First Amendment rights. *Younger*, 401 U.S. at 48; *Dombrowski v. Pfister*, 380 U.S. 479, 485-90 (1965); *Llewellen v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989). In *Dombrowski*, this Court held that immediate federal intervention was appropriate to remedy the chilling effect of having to undergo criminal proceedings brought "to discourage appellants' civil rights activities." 380 U.S. at 490. While the Court subsequently narrowed *Dombrowski's* broader dicta, *Younger*, 401 U.S. at 53-54, it simultaneously emphasized that federal injunctive relief *is* available where

prosecutions are brought to retaliate against the exercise of First Amendment rights. 401 U.S. at 48.[31]

The government argues that these First Amendment principles do not permit a federal court to "disregard express statutory limits on its own jurisdiction whenever delay in the resolution of disputed legal issues might temporarily discourage the exercise of First Amendment rights." Pet. Br. 42. But plaintiffs do not ask this Court to "disregard express statutory limits," but rather to interpret the statutory scheme to avoid "serious constitutional questions" by preserving meaningful and timely judicial review of a constitutional claim. At a minimum, the above cases establish that a statute that barred a person targeted in retaliation for his political speech and association from seeking timely injunctive relief would raise a serious constitutional question, and that principle must guide this Court's interpretation of the relevant statutes.

Moreover, while it is true that defendants in administrative or judicial proceedings must often "litigate the case to its

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[31] Relying on dicta from *Cameron v. Johnson*, 390 U.S. 611 (1968), the government maintains that federal intervention in a state criminal proceeding requires a showing that prosecutors have no expectation of obtaining a conviction. Pet. Br. 41. That is plainly wrong. Subsequent cases have made clear that federal intervention is appropriate if there is bad faith, harassment, *or* "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Moore v. Sims*, 442 U.S. 415, 432-33 (1979). The government cannot seriously contend that a defendant who could show that his state tax prosecution had been brought because he had spoken out in favor of campaign finance reform would be barred from seeking federal injunctive relief if the tax charge was arguable. *See Lewellen v. Raff*, 843 F.2d at 1109 (a prosecution brought in retaliation for First Amendment rights constitutes "bad faith," whether or not there is a basis for a conviction); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981) (same); *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984) (same); *Wichert v. Walter*, 606 F. Supp. 1516, 1521, 1525 (D.N.J. 1985) (finding bad faith where state disciplinary proceeding instituted in retaliation for plaintiff's speech).

conclusion, even where the gravamen of his claim is that the prosecution was unlawfully brought in the first instance," Pet. Br. 34-35, it is also true that where irreparable injury would result, the Court has authorized timely judicial intervention. In none of the cases on which the government or amici rely was any party denied a timely opportunity to seek relief for irreparable constitutional injuries. In *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982), for example, defendants had immediate access to a federal district court to raise their claim (that they were prosecuted vindictively for exercising their right to seek a change of venue) in the first instance. The only issue was the timing of *appellate* review, and this Court simply held that an interlocutory appeal was not available where a delay in resolution would cause no irreparable injury. *Federal Trade Comm. v. Standard Oil of California*, 449 U.S. 232 (1980), involved no constitutional claim at all, but simply a charge that antitrust proceedings had been instituted without sufficient evidence. Had Standard Oil shown that the FTC had instituted antitrust proceedings in retaliation for Standard Oil's support of the Republican Party, it would have been a very different case.

Where parties in administrative proceedings would suffer irreparable injury absent timely judicial intervention, the Court has not hesitated to authorize such intervention, even in the face of statutes otherwise barring review before the proceedings are completed. For example, although Section 205(g) of the Social Security Act makes a final decision denying benefits a "statutorily specified jurisdictional prerequisite" to judicial review, *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975), the Court has excused the "final decision" requirement where the claimant faces irreparable injury. *Bowen v. City of New York*, 476 U.S. 467, 482-86 (1986); *Mathews v. Eldridge*, 424 U.S. 319 (1976). "[T]he core principle [is] that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral

claims to be lost and potentially irreparable injuries to be suffered." *Mathews*, 424 U.S. at 331 n.11; *see also Rafeedie v. INS*, 880 F.2d 506, 526-29 (D.C. Cir. 1989) (Ginsburg, R., J., concurring) (applying same principles to § 1105a).

The government remarkably seeks to dismiss plaintiffs' irreparable First Amendment injuries as somehow irrational or unfounded. It suggests that plaintiffs—who have been told by the FBI Director and other officials that they were targeted in retaliation for their political activities and associations, J.A. 67, 72, 93-94—have no reason to change their behavior. Pet. Br. 43. This simply ignores reality. A rational immigrant will assume that if he continues to engage in those activities, it will only strengthen the government's resolve to deport him, whereas if he terminates the offending conduct, the government may well treat him like the many similarly situated aliens it has *not* sought to deport. Aliens in deportation cases, moreover, are peculiarly at the INS's mercy; the INS may, in its discretion, decide to detain them without bond at any time, drop the deportation proceedings altogether, and grant or deny them relief from deportation. As the lower courts found, plaintiffs have been chilled from engaging in the very political activity that sparked the government's action. *See* Statement, *supra*, p. 7.[32]

Irreparable injuries requiring injunctive relief prior to review of a final deportation order are likely to be rare. But if any case qualifies for such treatment, it is a proceeding

[32] Finally, the government argues that to the extent plaintiffs are chilled, the chill stems not only from this proceeding, but from an Executive Order and statute that make it a crime to provide material support to designated foreign terrorist groups. Pet. Br. 43 and n.19. But the government has admitted to targeting plaintiffs for a wide range of associational activity other than material support—including distribution of literature, recruiting other members, communicating with other members, and membership itself. *See* Statement *supra*, p. 5. As a result of this proceeding, and solely as a result of this proceeding, plaintiffs have been deterred from these activities, all of which are otherwise wholly lawful.

instituted in retaliation for the exercise of First Amendment rights. If an administrative agency instituted proceedings against a citizen for such a blatantly unconstitutional retaliatory motive, judicial relief would be swift and certain. Aliens deserve no less.[33]

II. SECTION 1252(g) DOES NOT APPLY TO PLAINTIFFS' SELECTIVE ENFORCEMENT CLAIMS

As noted above, since the government concedes that plaintiffs' deportation cases will be reviewed under the former § 1105a, and that plaintiffs' claims must be subject to judicial review, its invocation of a single provision of IIRIRA, 8 U.S.C. § 1252(g), is of little relevance. Either plaintiffs' claims can be adequately reviewed on appellate review under the prior § 1105a, in which case they must be heard there, or they cannot be adequately reviewed there, in which case they

[33] For the same reasons, habeas corpus review would be insufficient to address plaintiffs' ongoing First Amendment injuries. Pet. App. 14a-15a. Moreover, if the existence of habeas jurisdiction somehow barred original district court jurisdiction for collateral claims that cannot be addressed on § 1105a review, then *Cheng Fan Kwok*, *Stanisic*, and *McNary* would all have been wrongly decided.

Indeed, the government maintains that there is no habeas district court jurisdiction remaining after IIRIRA. Pet. Br. 45 n.20. The government cites cases now being litigated in dozens of lower courts involving the very different question of whether habeas is available for aliens who have been found deportable for certain crimes, have exhausted all administrative review, and face a jurisdictional bar on appellate review of their final deportation orders. The issue of what habeas corpus review remains where direct review is affirmatively prohibited raises a separate set of statutory and constitutional questions under 28 U.S.C. § 2241, the Due Process Clause, and the Suspension Clause. *See, e.g., Magana-Pizano v. INS*, 1998 WL 55011 (9th Cir. Sept. 1, 1998) (holding that aliens subject to bar on direct appellate review of deportation orders are constitutionally entitled to habeas review of their constitutional and statutory claims); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998) (holding as matter of statutory interpretation that habeas corpus review remains under 28 U.S.C. § 2241). *See generally* Amicus Br. of National Immigration Law Center.

must be reviewable in district court under general federal question jurisdiction. Thus, even on the government's view, it is unclear what, if anything, § 1252(g) adds to the resolution of this case.

The government argues that § 1252(g) applies here, but cannot then be read literally because it would have the anomalous result of barring *all* judicial review of most immigration actions in pending deportation cases. This is because § 1252(g) authorizes review only as provided in §§ 1252(a)-(f), but IIRIRA's effective date provisions dictate that §§ 1252(a)-(f) do not apply to pending cases. Pet. Br. 30-31 n.15.

The government proposes that the anomaly created by applying § 1252(g) without the remainder of § 1252 be avoided by interpreting § 1252(g) to allow direct appellate review under 8 U.S.C. § 1105a. This proposal would not provide adequate review here, because as shown above, plaintiffs' claims cannot be reviewed in a court of appeals under § 1105a. But equally problematically, the government's proposal runs directly counter to the language of § 1252(g), which bars jurisdiction "[e]xcept as provided in this section," and precludes reliance on "any other provision of law." The government does not explain how a statute expressly *barring* judicial review based on "any other provision of law" can be read to *authorize* judicial review based entirely on "other provision[s] of law."[34]

Plaintiffs offer two alternative readings that make sense of § 1252(g)'s terms and avoid unconstitutionally precluding review of their First Amendment claims.

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[34] The government's amici founder on the same difficulty. Amicus Criminal Justice Legal Foundation acknowledges the anomaly created by applying § 1252(g) independently of the rest of § 1252, and repeats the government's proposed solution, even as it admits that it is "a bit of a stretch." Amicus Br. at 12. Amici Washington Legal Foundation, *et al.*, fail to recognize the anomaly, and base their entire brief on the demonstrably erroneous premise that all of § 1252 applies to pending deportation cases.

A. Section 1252(g) Should Be Interpreted To Apply Only To Those Pending Deportation Cases As To Which The Attorney General Invokes The New Judicial Review Procedures Set Forth In The Rest Of Section 1252

First, § 1252(g) should be construed not to apply to pending deportation cases except where the Attorney General elects to apply all of § 1252 to such cases. IIRIRA's effective date provision provides that subject only to certain "succeeding provisions," IIRIRA's amendments "shall not apply" to deportation proceedings instituted before April 1, 1997, and that "those proceedings (including judicial review thereof) shall be conducted without regard to such amendments." IIRIRA, § 309(c)(1), 8 U.S.C. § 1101 note. The "succeeding provisions" establish a limited set of "transitional changes in judicial review," but those changes do not include § 1252(g). IIRIRA, § 309(c)(4), 8 U.S.C. § 1101 note.

This reading is supported by Congress's treatment of 8 U.S.C. § 1329 (1988) in IIRIRA. Section 1329 provided district courts with jurisdiction over claims arising under the INA, and was routinely relied upon, along with 28 U.S.C. § 1331, as a jurisdictional basis for district court collateral challenges.[35] In IIRIRA, Congress amended § 1329 to limit its authorization to cases filed by the United States.[36] However, Congress specifically provided that the amendments to § 1329

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[35] *See, e.g., Yi v. Maugans*, 24 F.3d at 506 (collecting cases); *Solehi v. INS*, 796 F.2d 1286, 1291 (10th Cir. 1986) (collecting cases); *Olaniyan*, 796 F.2d at 376; *Tooloee*, 722 F.2d at 1438..

[36] Prior to IIRIRA, and for all cases pending on IIRIRA's effective date, 8 U.S.C. § 1329 (1988) provides that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [8 U.S.C. § 1151-1365]." For cases instituted after IIRIRA's effective date, 8 U.S.C. § 1329 (Supp. II 1996) now provides that "[n]othing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers."

"shall apply to actions filed after the date of enactment of this Act," IIRIRA, § 381(b), 8 U.S.C. § 1329 note (Supp. II 1996), indicating that it intended pending cases filed under that provision, such as the case under review here, to continue unaffected by IIRIRA.[37]

The government counters that § 306(c) of IIRIRA states that § 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." But this provision is properly read not as dictating *to which cases* Section 1252(g) applies, but simply that when it applies, it will have retroactive effect as to *claims* arising from "past [and] pending" proceedings. Section 1252(g) would apply retroactively to claims arising from those cases where the Attorney General elects to invoke the new judicial review procedures for pending cases, as she is authorized to do under Sections 309(c)(2) and (3). Under § 309(c)(2), for example, the Attorney General may invoke IIRIRA in pending deportation proceedings simply by providing notice to the alien. IIRIRA, § 309(c)(2), 8 U.S.C. § 1101 note (Supp. II 1996). Section 306(c) makes clear that claims arising in those *pending* proceedings, which continue to be "deportation proceedings" but would be governed by the § 1252 "removal" rules, are subject to § 1252(g) even though it only refers to "removal orders." Under § 309(c)(3), the Attorney General may terminate deportation proceedings

[37] IIRIRA's legislative history also accords with this reading. IIRIRA's author, Congressman Lamar Smith, explained that "it was the clear intent of the conferees that, as a general matter, the full package of changes made by this part of title III [the judicial review amendments] effect (sic) those cases filed in court after the enactment of the new law, leaving cases already pending before the courts to continue under existing law." 142 Cong. Rec. H12293 (Oct. 4, 1996). He explained further that Congress did intend to "accelerate the implementation of certain of the reforms," and identified the accelerated reforms as those set forth in Section 309(c)(4), governing transitional changes in judicial review. *Id.* Siginificantly, he did not state that § 1252(g) should apply to pending cases.

in which evidentiary hearings have commenced, and reinitiate new removal proceedings under IIRIRA. IIRIRA, § 309(c)(3).[38] In such cases, § 306(c) makes clear that any claims arising from the *past* deportation proceedings would also be subject to § 1252(g). Under this reading, § 1252(g) will apply only when the rest of § 1252, to which it refers in its opening clause, also applies.

Plaintiffs' interpretation is supported by several rules of statutory construction. First, it saves what would otherwise be an absurd and unconstitutional statute.[39] Second, it makes sense of § 1252(g)'s crucial "except as provided in this section" language. Third, it preserves the status quo in pending cases, consistent with the dictate that statutes should not be read to effect substantial change in the status quo unless Congress makes that intent explicit. *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991). Here, Congress went out of its way to preserve the status quo for pending cases. Finally, whatever else might be said about these provisions, they are certainly ambiguous, and as this Court has long stated, courts must "constru[e] any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. at 449.

By contrast, the government's interpretation, which would have subsection (g) apply where the rest of § 1252 does not, renders specific language in subsection (g) ("except as provided in this section") meaningless, would mark a sea-change in the structure of judicial review for pending cases only, leads to an unconstitutional and absurd result, and resolves all ambiguities *against* the alien.

[38] The existing injunction, however, would bar the Attorney General from doing so in this case.

[39] *Johnson v. Robison*, 415 U.S. at 373-74; *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345 (7th Cir.) (statutes should be interpreted to avoid absurd results), *cert. denied*, 506 U.S. 861 (1992).

B. In The Alternative, If Section 1252(g) Applies To Pending Cases, It Should Be Interpreted Not To Preclude Review Of Constitutional Claims

If the Court rejects the interpretation set forth above and reads § 1252(g) to apply independently to pending cases, it should interpret the provision not to encompass constitutional claims that would otherwise evade meaningful judicial review. As this Court has consistently held, jurisdictional statutes should not be interpreted to bar review of constitutional claims unless Congress provides "clear and convincing evidence" that it intended that result. *Johnson v. Robison*, 415 U.S. at 373-74. Congress must be presumed to be aware of this well-established rule of statutory construction.

Yet in enacting § 1252(g), Congress did not specify that it intended to bar judicial review of constitutional claims—in fact, the provision does not even mention constitutional claims. Therefore, even if the Court agrees with the government that § 1252(g) applies to pending cases and incorporates § 1105a, it should construe § 1252(g), as it has many other jurisdictional statutes, not to apply to constitutional claims that cannot otherwise be adequately reviewed. As established above, plaintiffs' claims cannot be adequately reviewed both because they require factfinding beyond the administrative record, and because they are suffering ongoing irreparable injuries. There is no evidence whatsoever, much less "clear and convincing evidence," that Congress intended to bar judicial review of such claims in pending cases.

When § 1252(g) is properly interpreted not to apply to plaintiffs' claims, either by construction of its effective date provision, or by construing it to exempt constitutional claims, plaintiffs' claims would be governed by the same jurisdictional statutes that governed before IIRIRA. IIRIRA, § 309(c)(1). And as established above, under that review

scheme, plaintiffs' claims are properly cognizable in district court under 8 U.S.C. § 1329 and 28 U.S.C. § 1331.[40]

C. Plaintiffs' Interpretations Of Section 1252(g) As It Affects Pending Cases Are Consistent With Congress's Intent For Future Cases

Both of plaintiffs' alternative interpretations of § 1252(g) are supported by looking to the entirety of 8 U.S.C. § 1252. While the entirety of § 1252 governs only cases filed after April 1, 1997, and thus does not apply here, the fact that Congress has in § 1252 acknowledged the propriety of district court review for future cases supports the conclusion that Congress did not intend to foreclose such review for pending cases. When subsection (g) is applied in conjunction with the rest of § 1252, it creates a scheme remarkably similar to that under former § 1105a. *See* Pet. Br. 25 ("In significant respects, the new Section 1252 is consistent with former 8 U.S.C. § 1105a (1994)").

For future cases, Section 1252(b)(9) states that the court of appeals shall have exclusive jurisdiction over "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. § 1252(b)(9) (Supp. II 1996). But at the same time, Section 1252(f) authorizes individuals in future proceedings to seek injunctive relief against the operation of the removal provisions.[41] These subsections can be

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[40] If the Court rejects both of plaintiffs' proffered interpretations, and reads § 1252(g) to bar district court jurisdiction over plaintiffs' selective enforcement claims, then it must declare § 1252(g) unconstitutional as applied here, for the reasons set forth in Section I, *supra*.

[41] 8 U.S.C. § 1252(f) (Supp. II 1996) provides:

> LIMIT ON INJUNCTIVE RELIEF—
>
> (1) IN GENERAL—Regardless of the nature of the action or claim or of the identity of the party or parties bringing the

reconciled in the same way that courts interpreted the "exclusive" review scheme under former § 1105a. Under subsection (b)(9), the court of appeals has exclusive jurisdiction over all claims—statutory or constitutional—that can be adequately addressed on appeal from a final order of removal. But where direct appellate review is inadequate, subsection (f) authorizes individuals "against whom [removal] proceedings . . . have been initiated" to seek injunctive relief.

The government argues that this reading creates a conflict between Sections 1252(f) and 1252(b)(9). Pet. Br. 17, 33. But there is no conflict, because injunctive relief authorized by subsection (f) would only be appropriate where the court of appeals under subsection (b)(9) could not provide adequate relief. It would make no sense, after all, to assign the court of appeals exclusive review over claims that it *cannot* adequately address. Just as such claims fall outside of § 1105a because it is limited to "judicial review of final orders of deportation," *Cheng Fan Kwok*, 392 U.S. 206, so such claims would fall outside of 8 U.S.C. § 1252(b)(9), which is similarly limited to "review of an order of removal." 8 U.S.C. § 1252(b) (Supp. II 1996). Far from "authoriz[ing] a challenge that could not have been brought before IIRIRA was enacted," Pet. Br. 34, this interpretation merely maintains the status quo regarding collateral challenges.

The government objects that Section 1252(f) is a limit on judicial relief, not an authorization of jurisdiction. Pet. Br. 32.[42] Plaintiffs acknowledge that the first clause of § 1252(f)

> action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, [the removal provisions], *other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.*
>
> (Emphasis added).

[42] Subsection (f) is not itself an independent grant of jurisdiction, but under the structure of the Act, it need not be. By creating an express exception to subsection (g), it authorizes aliens to look elsewhere for jurisdiction, namely to 28 U.S.C. § 1331.

limits injunctive relief in certain respects not relevant here. But the government fails to give any meaning to the last clause of § 1252(f), which expressly contemplates that individual aliens in deportation proceedings may seek injunctive relief.[43]

Under § 1105a, it is well established that plaintiffs' claims cannot be heard on appellate review, and that therefore district court jurisdiction is appropriate. In enacting IIRIRA, Congress gave no indication that it disapproved of the jurisprudence so construing § 1105a, and it re-enacted the very "administrative record" language that had been held to limit the scope of appellate review. By enacting § 1252(f), Congress went even further, and codified what the courts had uniformly implied in interpreting former 8 U.S.C. § 1105a—namely, a right to seek district court injunctive relief where appellate court review is inadequate. There is simply no indication that Congress intended pending cases to be treated

[43] Amici Washington Legal Foundation, *et al.*, suggest that subsection (f) authorizes only appellate courts to issue injunctions. Amici Br. at 12 n.6. But this makes no sense, because where the court of appeals on appellate review of a removal order under § 1252 lacks jurisdiction to address a particular claim because it requires factfinding beyond the administrative record, it obviously cannot provide injunctive relief on that claim; for such claims, injunctive relief can be obtained only in district court under 28 U.S.C. § 1331. Plaintiffs' interpretation gives meaning to the government's concession below that § 1252(f) "allows a *district court* to issue an injunction against the operation of the provisions of the 1996 Act if such injunctive relief is appropriate." Supp. C.A. Brief for Appellants at 8 (emphasis added). Similarly, this interpretation gives meaning to the legislative history, which also indicates that Congress understood subsection (f) to authorize district court review. The House Committee Report states that because of subsection (f), "single *district courts* or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.," but "*may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights.*" H.R. Rep. No. 469 (Pt. 1), 104th Cong., 2d Sess. 161 (1996) (emphasis added).

differently, and therefore this Court should interpret IIRIRA to preserve the district court jurisdiction that pre-existed IIRIRA.

D. Plaintiffs' Reading Of Section 1252(g) Will Create No Additional Immigration Litigation Or Delays, But Simply Maintains The Status Quo With Respect To Pending Deportation Proceedings

Finally, plaintiffs' reading accords with Congress's intent, because it creates no additional immigration litigation or delays. Under the interpretation advanced here, the only claims that are cognizable in district court are those for which appellate review of a final deportation order is inadequate. Plaintiffs' selective enforcement claims fall into two such categories of claims: claims requiring factual development beyond the scope of the immigration proceedings, and claims requiring prompt judicial intervention to avoid irreparable injury. Directing such claims to district court, as the courts consistently did under former § 1105a, creates no duplication of litigation or unnecessary delays, because by definition these claims cannot be addressed adequately (or at all) on the otherwise exclusive appellate review under § 1105a.

Resolution of this case in plaintiffs' favor therefore simply maintains the status quo for cases filed before April 1, 1997 and still subject to § 1105a review. As this Court recognized in *Cheng Fan Kwok*, this interpretation does mean that litigation related to an individual's deportation may sometimes proceed on two separate tracks. But that is largely a function of Congress's and the INS's choice to limit the scope of the deportation proceeding. 392 U.S. at 217. Subject to constitutional constraints, it is generally open to Congress or the INS to expand the scope of matters reviewable in deportation proceedings, and that would in turn contract the scope of matters that must be litigated in district court. *Id.*

The government's interpretation, by contrast, asks this Court to alter substantially the accepted judicial interpretation of § 1105a, as reflected in *Cheng Fan Kwok* and *McNary*. It does so despite the fact that Congress in enacting IIRIRA said nothing to suggest that it disapproved of district court review for claims requiring factfinding beyond the administrative record, rejected a proposal to detour those claims through the court of appeals by providing for district court transfes, and instead re-enacted the "administrative record" limitation that necessitates district court review.

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

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